

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JIMMY D. PENWELL
Claimant

VS.

VULCAN CHEMICALS
Respondent
Self-Insured

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Docket No. 1,004,171

ORDER

Respondent appeals the April 16, 2003 preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes. Claimant was granted benefits after the Administrative Law Judge determined that claimant had suffered accidental injury arising out of and in the course of his employment with respondent beginning July 2001 and continuing each and every working day through January 8, 2002.

ISSUES

In its Application to the Appeals Board (Board), respondent raised the following issues on appeal:

- “(1) Whether ALJ Barnes erred in finding that the claimant suffered an accidental injury beginning July 2001 and continuing each and every working day to January 8, 2002;
- “(2) Whether ALJ Barnes erred in finding that the claimant suffered an accidental injury that arose out of and in the course of the claimant’s employment;
- “(3) The determination of whether the claimant is entitled to medical benefits;
- “(4) The determination of whether the claimant is entitled to temporary total disability benefits.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Board finds the Order of the Administrative Law Judge should be affirmed.

Claimant, a long-term employee for respondent, suffered a significant chemical and electrical burn in 1995. As a result of that injury, claimant missed work for a period of time and was ultimately returned to his employment with respondent. There is a dispute in the record regarding whether claimant was under restrictions, but claimant testified he generally did his regular job for a period of several years.

In July of 2001, claimant was transferred to a different job, which required that he stand stationary while cleaning copper cells. This lack of movement aggravated claimant's back symptoms.

Respondent contends that claimant's injury is simply a continuation of the August 2, 1995 original injury. Claimant, however, contends he suffered an aggravation of his preexisting condition as a result of a series of accidents through January 8, 2002, his last day worked. Claimant has been to a multitude of physicians and underwent surgery for a spinal fusion on November 6, 2002, with Alan Moskowitz, M.D. He was also referred to Theodore L. Sandow, Jr., M.D., a board certified orthopedic surgeon, for an independent medical examination on December 17, 2002. Dr. Sandow had the opportunity to evaluate claimant and also reviewed the many medical reports from Frederick R. Smith, D.O., Dr. Moskowitz, Larry Wilkinson, M.D., Paul S. Stein, M.D., and Jeff Drake, M.D. He also reviewed claimant's x-rays and MRI reports. After the examination and review of the records, Dr. Sandow determined that claimant's need for surgical treatment of his lumbar spine was "an accumulative effect of multiple aggravating factors, of which, work was one of them."

Claimant also testified that his need for surgery, which was paid for through his health insurance, was somewhat escalated by the fact that his health insurance was going to terminate as of January 2003. Since the matter had been denied by respondent's workers' compensation division and surgery had been refused, claimant felt he had no choice but to get the surgery paid for any way possible.

A letter from Ed Hoeller, respondent's representative, to Dr. Jacob Amrani does appear to indicate that claimant's workers' compensation benefits had ceased. However, the letter is somewhat unclear as to whether Mr. Hoeller was discussing workers' compensation benefits in general or merely the \$500 unauthorized medical allowance. Either way, claimant was under the impression that his medical benefits had been refused by respondent for both the 1995 and the 2002 accident dates. Claimant, therefore, proceeded with surgery, although unauthorized by respondent.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹

¹ See K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

It is well established under the Workers Compensation Act that, when a worker's duties aggravate or accelerate an existing condition or disease or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.²

At this juncture of the proceedings, claimant has established that he has suffered an aggravation or worsening of his preexisting back condition through a series of traumas constituting an injury culminating on his last day worked, January 8, 2002. The Board, therefore, finds that the Order of the Administrative Law Judge granting claimant benefits should be affirmed. Issues 3 and 4 raised by respondent from the preliminary hearing deal with claimant's entitlement to medical benefits and temporary total disability compensation. Those are not issues which are appealable from a preliminary hearing and those issues are, therefore, dismissed.³

As is always the case, preliminary hearing findings are not binding in a full hearing on the claim, but are subject to a full presentation of the facts.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated April 16, 2003, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 2003.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
John B. Rathmel, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Director

² *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

³ See K.S.A. 44-534a and K.S.A. 2001 Supp. 44-551.